

The Changing Face of Commercial Dispute Resolution in India

Introduction

In a historic move, on October 23, 2015, the President of India promulgated two ordinances which may have a far-reaching impact on the commercial dispute resolution system in India. This move comes in light of the government's constant endeavors to forge an investor-friendly environment in India. While the success of schemes like Make in India and Digital India are heavily reliant on investment, the protracted nature of dispute resolution process in India has always fueled apprehension in the minds of potential investors. To allay such apprehensions and overhaul the process of commercial dispute resolution, the Arbitration and Conciliation (Amendment) Ordinance, 2015 ("**Arbitration Ordinance**") and the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Ordinance, 2015 ("**Commercial Courts Ordinance**") (collectively, "**Ordinances**") have been promulgated. The Indian constitution empowers the President to promulgate ordinances when the Parliament is not in session. These ordinances have the same force and effect as acts passed by the Parliament.¹ The Ordinances are to be tabled before the Parliament in the winter session for their assent.

This newsletter examines the potential impact of the Arbitration Ordinance in making dispute resolution in India time efficient and cost effective and briefly touches on the similar provisions contained in the Commercial Courts Ordinance.

1. The Ordinances

The Arbitration and Conciliation Act, 1996 (the "**Act**") has come under a lot of criticism in the recent years. In an effort to overhaul the dispute resolution process and fill gaps in the law as it stands at present, the 246th report of the Law Commission of India headed by Justice A.P Shah (retired) recommended several major changes to the Act. To effect the changes suggested by this report, a bill was introduced in the Parliament on August 26, 2015, following which the ordinance was promulgated to immediately give effect to these changes.

The Commercial Courts Ordinance was promulgated pursuant to another bill introduced in the Parliament on April 29, 2015 to establish dedicated courts to try "commercial disputes"² with subject matter worth more than INR 100 million or about USD 150,000 or more. Since the term "commercial disputes" would include any dispute arising out of commercial agreements, any court intervention sought in commercial disputes involving an arbitration clause will be dealt with by commercial courts/divisions as long as the subject matter exceeds the above mentioned monetary limit. Commercial courts will be established at district level and commercial divisions and appellate divisions in the High Court. This ordinance also amends certain provisions of the Code of Civil Procedure ("**CPC**") in its application to disposal of commercial disputes.

¹ Article 123, Constitution of India

² This includes disputes arising out of ordinary mercantile transactions and different agreements like franchising, distribution and licensing, used in trade and commerce

2. Key changes

Some important changes that may impact the current dispute resolution process are as follows:

2.1 Time limits for resolution

Timely resolution of disputes is a key challenge faced in dispute resolution both in and out of courtrooms. In an effort to make the arbitration process time bound, the Arbitration Ordinance makes it mandatory for the tribunal to give the final award within 12 months from the date of first reference to the tribunal. This can be extended up to an additional 6 months with the consent of the parties, and any further extension sought by the tribunal requires the Court's consent. In such a case, the Court also has the discretion to reduce the arbitrators' fee by 5% for every month of delay and/or substitute one or more arbitrators on the tribunal. The ordinance also incentivizes arbitrators where the final award is passed within 6 months by entitling them to additional fees as agreed between the parties. Moreover, the parties may opt for fast-track arbitration, in writing, before or at the time of appointment of the tribunal. This fast-track process dispenses with the requirement for oral hearings and the final award is to be passed within 6 months. Appeals from any order passed by a court in relation to an international commercial arbitration or any domestic arbitration which would fall within the original jurisdiction of a High Court will be heard by commercial courts/divisions. The Commercial Courts Ordinance lays down a time limit of 6 months from the date of filing for disposal of appeals. Specifying time lines with penal fee deductions and incentivizing faster disposal of cases may prove to be the necessary impetus for expediting the dispute resolution process.

2.2 Clarifying scope of judicial interference in arbitration

The scope of court intervention at various stages of an arbitration process has seen a lot of jurisprudential debate. Section 8 of the Act mandates Courts to refer parties to arbitration, where the dispute is subject to an arbitration agreement. In exercise of their powers under this section, Courts have often gone beyond merely examining the validity of the arbitration agreement. For instance, the Supreme Court has held that matters involving serious allegations of fraud and malpractice cannot be referred to arbitration and should rather be decided by Courts.³ Section 8, as amended by the Arbitration Ordinance, makes it compulsory for Courts to refer a matter to arbitration as long as it arrives at a *prima facie* determination regarding a valid arbitration agreement. A similar restriction has been imposed on the power of the Court in appointment of the tribunal under Section 11. Earlier, the Supreme Court, in *Anil Kumar v. B.S. Neelkanta*⁴, had held that the Court could look into arbitrability of the subject matter of the dispute before appointing a tribunal. The amendments to Section 8 and 11 of the Act restrict the scope for the Court's evaluation of arbitration agreements before the arbitration process commences.

³ *N. Radhakrishnan v. Maestro Engineers*, (2010) 1 SCC 72

⁴ AIR 2010 SC 2715; *See also A.P.T.D.C v. Pampa Hotels Limited*, AIR 2010 SC 1806

2.3 Streamlining process for interim relief

Section 9 of the Act provides for court intervention, not just before, but also during and after the arbitration but before enforcement of the award for interim relief and enforcement. There has been a strong need to streamline the scope of interim relief associated with the process of dispute resolution. Section 9 of the Act allowed parties to approach Courts for interim relief, at any time before arbitration commences till the award is enforced. This option has now been restricted up to the constitution of the tribunal. Once the tribunal is constituted, for the duration of the arbitration, the parties can only approach the tribunal for interim relief under Section 17 of the Act and interim orders passed by the tribunal are enforceable as a Court order. Moreover, since these provisions pertaining to interim relief granted by Courts fall within Part-I of the Act⁵, it has led to judicial disagreements over the applicability of such provisions to international arbitrations which are covered in Part-II of the Act. Earlier, the Supreme Court in *Bhatia International v. Bulk Trading*⁶, had held that Part-I shall be applicable to international commercial arbitrations outside India, unless expressly excluded by the parties. In *BALCO v. Kaiser Aluminum Technical Services*⁷, the Supreme Court reversed this and held that once the parties have decided to have arbitration outside India no interim relief can be granted by Indian courts. This raised ambiguity with regard to the forum where interim orders could be sought in arbitrations held outside India but where the assets are located in India. Seeking interim relief outside India but then enforcing in India brings with it a different set of challenges in terms of enforcement of such foreign judgments/orders in India. The Arbitration Ordinance clarifies this position by making only certain provisions of Part-I applicable to international arbitrations, viz., interim relief granted by Courts under Section 9 and appeals from such interim orders under Section 37 of the Act.

2.4 Reinforcing enforcement provisions

One of the most important aspects of arbitration has been the finality and enforcement of awards. Section 34 of the Act contains grounds for challenging an award, which includes, *inter alia*, conflict with the public policy of India. The Supreme Court, in the past, has given very wide interpretations to this ground in *ONGC v. Saw Pipes*⁸ and *DDA v. R. S. Sharma*.⁹ The Arbitration Ordinance clarifies this position by stating that the ground of “conflict with the public policy of India” would arise only if: (a) the award was induced or affected by fraud or corruption, (b) the award is in conflict with the fundamental policy of Indian laws (barring any review of the merits of the dispute) or (c) the award is in conflict with the basic notions of morality and justice. This restricts the scope of judicial interpretation of the unbridled horse called “public policy”. Any challenge made under this section has to be disposed of within 1 year from the date on which notice is served on the other party. The Arbitration Ordinance also amends Section 36 of the Act to clarify that mere filing of application challenging an arbitral award does not, by itself, render such award unenforceable, unless the Court where such award is being challenged grants a stay to that effect. This nullifies the interpretation taken by the Supreme Court in *National Aluminium Co. Ltd. v. Pressteel and Fabrications*,¹⁰ wherein it was held

⁵ This Part applies only to arbitrations taking place within the territory of India

⁶ (2002) 4 SCC 105

⁷ (2012) 9 SCC 552

⁸ (2003) 5 SCC 705

⁹ (2008) 3 SCC 80

¹⁰ (2004) 1 SCC 540

that pending a challenge to the award under Section 34 of the Act, there is an automatic stay on the operation of an arbitration award. Further, the amended provision also requires the Court to ask for security against payment of money before granting such stay on enforcement. These provisions fortify the finality of the arbitral award for effective enforcement.

2.5 Cost of the dispute

The Arbitration Ordinance has inserted Section 31-A in the Act, giving the tribunal the discretion to award costs as well as to decide the quantum and terms of payment of costs. Both Ordinances lay down the factors that the Court/tribunal must take into account while determining the award of costs, which include, *inter alia*, (a) the conduct of parties, (b) whether a party has succeeded partly in the case, (c) any frivolous counter-claims filed to delay the proceedings, and (d) whether any reasonable offer to settle has been refused.

3. Anticipated impact

The changes introduced by the Arbitration Ordinance, along with the introduction of commercial courts and divisions, aim to make the dispute resolution process more efficient in terms of time, cost and procedural efficacy. Apart from prescribing indicative timelines for disposal of cases, both Ordinances have incorporated safeguards against dilatory tactics by giving discretion to the court/tribunal to order costs based on reasons recorded, and even award costs to the unsuccessful party based on a number of factors. Similarly, incorporating international best practices like case management hearings will go a long way in ensuring that courts and tribunals adhere to these timelines. This would ensure that all necessary parties conduct themselves with the objective of expediting dispute resolution.

Conclusion

The Ordinances have introduced some radical changes which will hopefully aid and expedite the resolution of commercial disputes both in and out of the court room. However, the long term impact of these Ordinances can only be seen if and when they are passed by the Parliament. Ordinances are temporary in nature and will lapse if they are not passed by both houses of the Parliament within six weeks of their reassembly. The Parliament is scheduled to reassemble for its winter session from November 26, 2015. Though the bills corresponding to these Ordinances had been tabled earlier in the Parliament, they had not been passed to give them statutory force. If the Ordinances are allowed to lapse this time, without being passed by the Parliament, the legislative process will have to start afresh, with re-introduction of the respective bills in both houses of the Parliament. This would defeat the purpose behind promulgation of the Ordinances, i.e., to enforce the necessary changes in law with immediate effect. Therefore, the Parliament needs to give its assent to these Ordinances within the specified time limit so as to enforce the proposed legal changes, and bridge the gap between intent and implementation of the law.

Author

Anubhuti Mishra